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In the Supreme Court of the United States

OCTOBER TERM 1962

No. 358

J. E. AUDET, ET AL., AND FLOYD ARDELL ADAMS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The Court of Claims did not write an opinion.

JURISDICTION

The judgment below was entered on May 25, 1962. The petition for a writ of certiorari was filed on August 21, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

STATUTE INVOLVED

28 U.S.C. 1500 provides:

> The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

QUESTION PRESENTED

Whether a claim cognizable only under the Tort Claims Act and pending in another court was properly dismissed by the Court of Claims.

STATEMENT

These suits, brought in the Court of Claims under the Tucker Act, seek recovery for damage to lands and personal property of petitioners resulting from the collapse of levees on the Feather River in California in 1955 and the ensuing escape of flood waters. The levees were constructed by the United States in connection with the Sacramento River Flood Control Project. Petitioners represent 164 persons affected by the floods, and the damages claimed aggregate approximately $13,000,000.

The petitions filed in the Court of Claims further set forth (par. VI):

> Actions are pending in the United States District Court for the Northern District of Cali-

fornia, Northern Division (Sacramento, California), which are actions against the United States of America on behalf of each petitioner herein for the same damage herein and arising out of the same facts as form the basis of the within Petition, the sole difference being that the actions there pending are claims based on negligence, whereas this Petition is in inverse condemnation.[1]

ARGUMENT

1. The Court of Claims correctly dismissed the petitions. 28 U.S.C. 1500 excludes from the jurisdiction of the Court of Claims "any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States." Whether "claim" as used in 28 U.S.C. 1500 means "cause of action," as urged by petitioners (Pet. 7-9), might be a relevant question in a situation where the operative facts supported two separate theories of recovery. This is not such a case. The petitions on their faces negate any claim cognizable by the Tucker Act. Although the petitions use the phrase "inverse condemnation," the facts alleged fall far short of constituting a taking of property for public use. The sole complaint is that the United States, in the light of the entire flood control project, should have built stronger levees. But it was not the construction of the levees which damaged petitioners' property. To

[1] The suits filed under the Tort Claims Act have been dismissed but appeals have been taken and are pending in the Ninth Circuit.

constitute a taking there must be "a direction to do that which resulted in a taking" *United States* v. *Lynah*, 188 U.S. 445, 467. Long before the Tort Claims Act permitted enforcement of tort liability against the United States, the line of demarcation between tort and taking was clearly drawn by this Court under parallel factual conditions in *Sanguinetti* v. *United States*, 264 U.S. 146, this Court stating at pp. 149-150:

> * * * in order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property. * * * It was not shown that the overflow was the direct or necessary result of the structure; nor that it was within the contemplation of or reasonably to be anticipated by the Government. If the case were one against a private individual, his liability, if any, would be in tort. * * *

So, here, the flooding which allegedly damaged petitioners' property was not the direct result of the structure, nor within the contemplation of the project. In fact, just the opposite is true. The purpose of the levees was to protect the land. Certainly no servitude has been imposed upon the land by the failure of the levees to perform their intended function and, accordingly, nothing has been taken. Cf. *United States* v. *Cress*, 243 U.S. 316; *Peabody* v. *United States*, 231 U.S. 530.

That petitioners were simply re-alleging their tort claims in the Court of Claims is clear from two addi-

tional considerations. First, if there is a taking, the property interest taken vests in the United States. *United States* v. *Causby*, 328 U.S. 256. Yet, here there is no easement or other interest that would vest in the United States upon payment of judgments. Second, the amounts claimed do not purport to represent the value of such an interest. On the contrary, the complaint specifies all the normal items of tort recovery, such as loss of profits and damage to personal property, including even "clothing and personal effects." The mere characterization of "inverse condemnation" cannot change the essential nature of the case. Since it involves only a tort claim, the Court of Claims could, in no event, entertain it. See 28 U.S.C. 1346(b). And since it is in all respects the same claim as petitioners had already filed in the district court, it was property dismissed under 28 U.S.C. 1500. *British American Tobacco Co.* v. *United States*, 89 C.Cls. 438, certiorari denied, 310 U.S. 627.

2. Petitioners' remaining contentions fall with the conclusion that their claim sounds in tort: On the present facts, there is no question of discrimination between large and small claimants. There is only one claim or cause of action which is cognizable in only one court without regard to the amount in controversy. Similarly, since there is a statute waiving immunity (the Tort Claims Act) and a forum where the claims can be and are being heard, the question of sovereign immunity (Pet. 12-15) is not presented.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully,

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SEPTEMBER 1962.

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